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No. 06-1649

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SUPREME COURT, U.S.

In the Supreme Court of the United States

ESTATE OF DOROTHY L. MORRISSEY

AND

MICHAEL J. MORRISSEY,

Petitioners,

v.

ROBERT LESNIAK, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

ESTATE OF DOROTHY L. MORRISSEY
BY: MICHAEL J. MORRISSEY, ITS ADMINISTRATOR
AND
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QUESTIONS PRESENTED ON REHEARING

I. Whether a trial court that does not have personal jurisdiction over defendants due to none of the defendants having been served with process, is able to lawfully proceed to act in imposing Rule 11 sanctions in favor of the defendants, and to act on other substantive matters in dismissing the case, absent personal jurisdiction over the defendants?

II. Whether Rule 11 sanctions are lawfully imposed when the trial court only summarily lists an amount as sanctions under Rule 11 without addressing any other issues required under the Rule 11 statute.

III. Whether a trial court order is a Final order subject to appeal when the order does not address or reference all cases that are involved in the case in which the trial court's order is entered.

PARTIES

All parties to this action are listed in the caption of the case in the Court of Appeals' opinion, at Appendix A, page 1a of the Petition for Writ of Certiorari. Petitioner on Rehearing files this in his own name only, as a party to the case. Petitioner does not file on behalf of the Estate nor as the Administrator of the Estate.

CORPORATE DISCLOSURE

There are no corporate issues in this case.

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STATEMENT OF RELATED CASES

Petitioner adopts its Statement of Related Cases as previous filed at page 1 of its Petition for Writ of Certiorari, and incorporates same herein by reference.

OPINIONS BELOW

Petitioner adopts its Opinions Below as previous filed at page 1 of its Petition for Writ of Certiorari, and incorporates same herein by reference.

JURISDICTION AND AUTHORITY

Petitioner adopts its Jurisdiction And Authority as previous filed at page 1 of its Petition for Writ of Certiorari, and incorporates same herein by reference.

STATEMENT OF THE CASE

Petitioner adopts its Statement of the Case as previous filed at pages 2-3 of its Petition for Writ of Certiorari, and incorporates same herein by reference.

STATEMENT OF THE ISSUES

In this Petition for Rehearing, petitioner asserts as issues on Rehearing:

1. That the Order in the District Court is void *ab initio* due to lack of jurisdiction based on the District Court's finding recited in its Order that none of the defendants were served with process.

2. That the Order of the District Court is not a final order because it does not address other cases that present differing facts/causes of action that were to be heard together with the case in which the District Court's Order was entered, leaving issues in the case still not ruled on and pending before the District Court.

3. That the District Court committed reversible error in summarily imposing over a million dollars as Rule 11 sanctions, with over half a million dollars being imposed against each of the plaintiffs, which is clearly excessive under Rule 11, and in failing to apply and address the other safeguards and procedural requirements that are mandated under the Rule 11 statute and its case law.

These three issues are listed at pages 3-6 in Petitioner's Petition for Writ of Certiorari as items number 1 (lack of jurisdiction, at page 3 and discussed at paragraph V. at pages 16-17); number 2 (not a final order, at page 4), and number 4 (excessive and non-compliant Rule 11 sanctions imposed, at pages 5-6 and discussed at paragraph II at pages 11-12, and at paragraph IV at pages 13-16).

STATEMENT OF THE FACTS

Petitioner adopts its Statement of the Facts as previous filed at pages 6-7 of its Petition for Writ of Certiorari, and incorporates same herein by reference.

REASONS ON RECONSIDERATION FOR GRANTING THE WRIT

I. THE DISTRICT COURT DID NOT HAVE PERSONAL JURISDICTION OVER ANY DEFENDANT IN THE CASE PER ITS ORDER AND THUS COMMITTED REVERSIBLE ERROR IN IMPOSING RULE 11 SANCTIONS IN FAVOR OF THE DEFENDANTS WHO WERE NOT BEFORE THE COURT.

Petitioner brings the following recent cases to the Court's attention as support for its position that the District Court did not have personal jurisdiction over any defendant, since no defendant was served with process (finding of the District Court's Order). The case should, at that point, have been dismissed for lack of jurisdiction, and the District Court's failure to do so constitutes reversible error. It also nullifies the District Court's actions thereafter that went on to dismiss the case on a statute of limitations basis without any evidentiary record established, and imposing Rule 11 sanctions in favor of defendants that had never been served and were therefore not subject to the Court's jurisdiction.

NO PERSONAL SERVICE, NO PERSONAL JURISDICTION, NO SANCTIONS.

- *Maryland Nat. Bank v. M/V Tanicorp I*, 796 F.Supp. 188 (D.Md.1992).

In this case, both Plaintiff and Defendant made motions for sanctions against one another under Rule 11. According to Plaintiff, Defendant Weisman

submitted numerous documents without legal or factual basis asserting that the Court did not have ***in personam jurisdiction*** over him. While the Court is sympathetic to Plaintiff's arguments for Rule 11 sanctions, this Court does not believe, however, that Defendants' conduct and pleadings are sufficiently not well enough grounded in either fact or law to justify the Court's granting of sanctions against the Defendant. Therefore, both Motions for Rule 11 Sanctions are denied.

- *Byrnes v. Jetnet Corp.* 111 F.R.D. 68 (M.D.N.C.1986)

Held: That without personal jurisdiction over Macfield, the Nebraska court would be unable to impose sanctions against it. 8 C. Wright & A. Miller, Federal Practice and Procedure, § 2287 (1970).

- *Additive Controls & Measurement Systems, Inc. v. Flowdata*, Inc. 96 F.3d 1390 (C.A.Fed. Tex. 1996) (citing *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir.1930)).

In this case the court stated that Judge Learned Hand made the same point earlier in a patent infringement case similar in some respects to this one. In *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir.1930), the district court entered an injunctive decree against one defendant. The plaintiff then sought and obtained contempt sanctions against Joseph Staff, a former employee of the defendant, who had been dismissed as a party to the original case before the entry of the injunction. The plaintiff argued that the injunction should be construed as applying by

its terms to Staff, but the court of appeals rejected that argument and reversed. The court held that **the district court was not authorized to issue an injunction against Staff, since he was not a party to the underlying action.** The court explained:

> [N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen*, and the persons enjoined are free to ignore it. **It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.**

(emphasis added).

- *Brown v. PRC, Inc.* 91 F.3d 129 (C.A.4 Va. 1996).

In this case, appellants' notice of appeal was filed before the court's amended order granting Davis's and Johnson's Rule 59(e) motion and before the district court's disposition of appellants' Rule 60(b) motion and is thus "ineffective to appeal from the judgment or order." Appellants failed to amend their original notice of appeal or to file a new notice of appeal as is plainly required by Rule 4(a)(4) **in order to appeal the district court's amended order imposing Rule 11 sanctions. Accordingly, we lack jurisdiction to review the district court's March 24 Amended**

Order and dismiss this appeal for want of jurisdiction. (emphasis added).

- *Nationwide Mut. Ins. Co. v. Burke* 897 F.2d 734 (C.A.4 W.Va.1990).

The appellant Court considered Nationwide's argument that the district court erred in refusing to impose Rule 11 or contempt sanctions against the Hamiltons' attorney for his conduct in seeking state court enforcement of the settlement agreement. The contention is that the enforcement motion in state court had no legal or factual foundation, so that **the district court should have imposed Rule 11 sanctions under its retained jurisdiction.** *See* J.A. at 47 (citing *Langham-Hill Petroleum Inc. v. Southern Fuels, Co.*, 813 F.2d 1327, 1330-31 (4th Cir.1987) (district court may impose sanctions even after judgment is entered)). This contention is without merit-for a very simple reason. The motion to enforce the settlement agreement was filed in state court, and in no way constituted a "pleading, motion, or other paper ... signed in violation of" federal Rule 11. **"Rule 11 proceedings were never intended to resolve disputes between parties ... [or] to determine misrepresentation questions where the misrepresentation is not reflected in a pleading, motion or paper filed with the district court." *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 621 (8th Cir.1987). Accordingly, the district court's dismissal of Nationwide's motion to impose Rule 11 sanctions was proper.** (emphasis added).

Petitioner calls the Court's attention to the fact that the only pleading petitioner signed in this case

was the initial Complaint. As to it, no Discovery or evidence of any kind had been taken, and hence the assertions made therein are, under the law, assumed to be true at this point. In fact, the assertions on the merits of the causes of action in the Complaint were not addressed by the District Court.

The U.S. Supreme Court in Case No. 02-1606, styled *Tennessee Student Assistance Corporation, Petitioner vs. Pamela L. Hood*, on a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, held that an "adversary proceeding" requires the service of a summons and a complaint. (First paragraph, under section III of the Decision.) It follows then that without the service of a summons and complaint, there is no adversary proceeding, i.e. the court has no personal jurisdiction over the defendants.

Although the case is directed to a Tennessee statute concerning student loans and concerned a Bankruptcy proceeding, the principle requiring the service of a summons and a complaint for an adversary proceeding reflects the same well-established rule that applies to the present civil case.

In the present case, the trial court's order clearly states that no defendant was served with process. It therefore follows that the court had no personal jurisdiction over any defendant and its rulings that nonetheless followed are null and void for lack of jurisdiction, per the trial court's own finding of no service, i.e. no jurisdiction, as set forth in its order.

II. THE DISTRICT COURT COMMITTED REVERSIBLE IN IMPOSING RULE 11 SANCTIONS WITHOUT COMPLYING WITH THE CONDITIONS PRECEDENT TO MAKING SUCH AN ASSESSMENT, AND FURTHER COMMITTED REVERSIBLE ERROR IN IMPOSING SANCTIONS THAT ARE CLEARLY EXCESSIVE.

Petitioner brings the following recent cases to the Court's attention as support for its position that the District Court's summary action as regards the imposition of Rule 11 sanctions is unwarranted, unsupported by any evidence of Record, is gravely excessive and violates the Rule 11 standards in not applying the consideration factors and conditions of Rule 11.

(1) OFFENDER'S ABILITY TO PAY AS FACTOR IN OVERTURNING SANCTION:

- *Salvin v. American Nat. Ins. Co.*, Slip Copy, 2007 WL 1097891 (E.D.Va. 2007)

Held: The court is required to take into account the ability of the sanctioned party to pay. *See, e.g., Byrd v. Hopson*, 108 Fed. Appx. 749, 756 (4th Cir.2004) (unpublished) (citing *In re Kunstler*, 914 F.2d 505, 523 (4th Cir.1990)). Although *Kunstler* addressed sanctions under Rule 11, it noted that "[t]he offender's ability to pay must also be considered, not because it affects the egregiousness of the violation, but because the purpose of monetary sanctions is to deter attorney ... misconduct." *Kunstler*, 914 F.2d at 524. *See also Kapco Mfg. Co., Inc. v. C & O Enterprises, Inc.*, 886 F.2d

1485, 1496 (7th Cir. 1989) (noting that a court may take into account ability to pay in a *section 1927* claim).

(2) DENIAL OF RULE 11 SANCTIONS BY 4TH CIRCUIT:

*** Offender's ability to pay amount of sanctions

- *** *Leach v. Smith*, Slip Copy, 2007 WL 2155742 (E.D.Va. 2007)(discusses offender's ability to pay)

- *** *Bowers v. Rector and Visitors of University of Va.*, Slip Copy, 2007 WL 2963818 (W.D.Va. 2007)(discusses offender's ability to pay)

- *Scinto v. Preston*, Slip Copy, 2007 WL 1847289 (E.D.N.C. 2007)

- *Hospira, Inc. v. Alpha and Omega Transp. Services, Inc.*, Slip Copy, 2007 WL 1825182 (W.D.N.C. 2007)

- *Wallace v. Mercantile County Bank*, — F.Supp.2d—, 2007 WL 2572434 (D.Md. 2007)

- *Contech Stormwater Solutions v. Baysaver Technologies, Inc.* Slip Copy, 2007 WL 2872074 (D.Md. 2007)

- *Commonwealth Group-Winchester Partners, L.P. v. Winchester Warehousing, Inc.*, Slip Copy, 2007 WL 2570218 (W.D.Va. 2007)

- *Wadley v. Park at Landmark, LP*, Slip Copy, 2007 WL 1472211 (E.D.Va. 2007)

- *Segen v. Buchanan General Hosp., Inc.*, Slip Copy, 2007 WL 1094403 (W.D.Va. 2007)

(3) RULE 11 SANCTIONS OVERTURNED ON APPEAL:

- *Morris v. Wachovia Securities, Inc.*, Slip Copy, 2007 WL 2126344 (E.D.Va. 2007)

In this case, of 11 separate possible sanctions, one was deemed unwarranted based on the legal theory it was tied to. Court assessed attorney Schulman's amenability to sanctions under Rule 11(c) and disagreed w/ Wachovia's argument that Schulman should be sanctioned on the theory **that he abdicated his responsibilities as lead counsel.** "In fact, Schulman devoted only approximately ten billable hours to this case and, he says, that he devoted an additional twenty to thirty hours that were not billed. It is doubtful that the work performed by Schulman as lead counsel was adequate to satisfy the responsibilities of lead counsel, but whether the responsibilities of lead counsel were satisfied **is not the proper measure of whether sanctions should be imposed.** Wachovia has cited no authority which would support such an application of Rule 11(b) or (c)."

(4) In the recent case of *Irina Alexandrovna Johnson, petitioner, Appellant vs. Bryan Craig Johnson, Respondent*, filed January 30, 2007 in case no. A06-977, the Minnesota State Court of Appeals reviewed and Reversed the lower court's application of a Minnesota statute which tracks that of the FRCP's Rule 11. The Appellate Court held that the purpose of awarding attorney fees under the Minnesota statute

and its rule of civil procedure rule 11 is deterrence rather than punishment, the "safe-harbor" provision of the statute and rule is mandatory in requiring adequate notice of the possibility of a sanction *before filing* the motion with the court. It reversed the Rule 11 assessment, stating: "By failing to apply the mandatory "safe-harbor" provision, the district court erred as a matter of law." (Taken from last sentence near the end of the decision, before the concluding DECISION paragraph.)

While the case concerned a Minnesota statute, that statute like that of many if not most other States, tracks the provisions of the Federal Rule 11 of the Federal Rules of Civil Procedure (FRCP).

In the present case, the trial court made no finding as to any of the required checklist items of Rule 11 that are mandatory prior to any Rule 11 costs being imposed, including, although not limited to, this safe-harbor provision. Other factors mandated to be addressed under Rule 11 include (1) the party's financial ability and status, and (2) a required explanation as to the basis for imposing any Rule 11 sanctions and a reasoned decision as for the amount imposed. None of this was done in the present case.

III. THE DISTRICT COURT DID NOT ENTER AN APPEALABLE FINAL ORDER BECAUSE CASES THAT WERE BEFORE THE COURT TO BE DECIDED WITH THE PRESENT CASE IN WHICH THE ORDER WAS ENTERED WERE NEVER REFERENCED, ADDRESSED OR DECIDED IN THE DISTRICT COURT'S ORDER.

(1) An Illinois State Court decision, posted on September 19, 2007, in the case of *In re Reiny S.*, No. 1-06-2155 (6/29/07) addressed on appeal the issue of whether the appealed order was Final as disposing of all issues with finality. Although the case dealt with a parental unfitness issue and termination of parental rights to private guardianship, on the petition for rehearing the State's Appellate Court held that a permanency goal (an order changing parental rights to private guardianship) is a non-final order because it is not a final determination of all issues on the merits. Even though the case deals with a specific State statute on parental rights and guardianship, the principle is the same.

In the present case, other cases were to be heard by the same court. Yet, the court in its order never mentions, references, lists or rules as to the other cases. Therefore, the order of the District Court that is the subject of this Petition for Rehearing is not final and the matter should have been remanded back to the District Court for disposition of the cases that still remain to be considered that are not addressed in, nor covered by, the District Court's order.

(2) The Wisconsin Supreme Court issued two decisions on March 21, 2007 that addressed the issue of when an order for purposes of appeal is "final". In *Wambolt v. West Bend Mutual Ins. Co.*, No. 2005AP1874, and in *Tyler v. The RiverBank*, No. 2005AP2336, the Court held that an Order, to be final, must not just "decide" all issues, but must also "dispose" of them. The issue in those two cases was whether an order granting summary judgment in favor of the defendant, but not dismissing the defendant from the case, is a final order for purposes of appeal? The Court held that it was NOT, holding that a final order must contain an explicit statement either dismissing the entire matter in litigation or adjudging the entire matter in litigation as to one or more parties. The Court further added that "appellate courts should liberally construe ambiguities to preserve the right of appeal. In the two cases before it, the Wisconsin Court concluded by distinguishing "deciding" from "disposing" in the two cases.

This same reasoning and result provides guidance and supports petitioner in the present case, where the District Court did not decide and dispose of all the cases that it had before it that were to be decided together, which it did not do. The subject Order is, therefore, not Final for appeal purposes and the case should be reversed and/or remanded back to the District Court.

CONCLUSION

The new cases cited support petitioner on the issues presented and further show from the recent decisions the sharp discrepancy of the actions taken in this case.

To leave these rulings as they now stand creates a drastic conflict with established law of the Fourth Circuit as well as that of other circuits. If left uncorrected, it will create further discrepancies when cited in other cases. The enormous burden to this petitioner by these rulings as contrary to existing law further requires that justice be served in addressing the errors cited. Petitioner submits this may be a matter for the Court's Summary Reversal or Summary Remand docket due to the clear errors on these points in the Record and for which full briefing and oral argument before this Court might not be necessary or appropriate.

Respectfully submitted,

MICHAEL J. MORRISSEY
Petitioner.

TABLE OF APPENDICES

Appendices to the Petition for Rehearing are the same Appendices A-E as previously filed, and presented at pages 1a - 115a of petitioner's Petition for Writ of Certiorari. That appendix is incorporated herein by reference.

CERTIFICATION

The foregoing is restricted to the grounds specified in 44.2 S. Ct. R. and it is presented in good faith and not for delay.

Michael J. Morrissey
Petitioner